

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 25, 2001 Session

STATE OF TENNESSEE v. DONALD EADY, SR.

Direct Appeal from the Circuit Court for Bradley County
No. 99-194 Carroll L. Ross, Judge

No. E2000-01940-CCA-R3-CD
July 30, 2001

The defendant, Donald Eady, Sr., was indicted for attempted second degree murder, a Class B felony. See Tenn. Code Ann. §§ 39-12-101, 39-13-210. He was convicted of the lesser included offense of attempted voluntary manslaughter, a Class D felony. See Tenn. Code Ann. §§ 39-12-101, 39-13-211. The trial court imposed a Range III sentence of 12 years. On appeal, the defendant argues (1) that the trial court erred by allowing testimony regarding prior bad acts; and (2) that the trial court erred by refusing to instruct the jury on the lesser included offense of attempted criminally negligent homicide. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed.

GARY R. WADE, P.J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Kenneth L. Miller, Cleveland, Tennessee, for the appellant, Donald Eady, Sr.

Paul G. Summers, Attorney General & Reporter; Mark A. Fulks, Assistant Attorney General; and Joseph Hoffer and Steven Crump, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

At approximately 12:30 a.m. on April 2, 1999, the Bradley County Sheriff's Department received a report that there had been a stabbing at Ocoee Village Apartments in Cleveland. Lieutenant Jerry Rodgers, who investigated the crime, discovered the victim, William George Bass, near unit 64 with a towel pressed against his neck. Before leaving for the hospital, the victim informed Lt. Rodgers that he had been stabbed and hit in the head with a baseball bat by the defendant.

Because an earlier complaint had been made at the same location, officers had questioned the defendant, Donald Eady, Sr., and his son, Co-Defendant Timothy Eady,¹ only a short time before the stabbing occurred. No arrests had been made at that time. When Lt. Rodgers found the defendant after the second call, he observed a small cut on his hand. Through interviews with other witnesses, Lt. Rodgers confirmed that the defendant had stabbed the victim.

At trial, the victim testified that Rhonda Patterson had invited him and others to her apartment for drinks. The victim recalled that during the course of the evening, he asked Ms. Patterson how she had received some bruises he observed on her arms and legs. When Ms. Patterson invited the victim to her bedroom to discuss the issue privately, the defendant began beating on the bedroom door, yelling that "it wasn't right" for them to be together alone. The victim recalled that the defendant continued to beat and kick the door, insisting that they were not "supposed to be in there . . . like that." The victim maintained that when he opened the door, the defendant "got up in [his] face." Several of the other guests then escorted the defendant, who resisted, out of the apartment. According to the victim, the defendant returned to the apartment a few minutes later and threatened him with "a machete or . . . sword." When the defendant began to swing the weapon, the victim was able to take it from his hands. Peggy Self, a guest at the party, intervened and directed the defendant to go home. The defendant left only when someone yelled, "the law is coming."

Upon further questioning at trial, the victim acknowledged that when the officers arrived on the first occasion, he did not tell them about the defendant's use of the machete or sword, explaining that he did not want anyone to go to jail. When the officers left the scene after their first visit, only the victim, Ms. Patterson, Ms. Self, and Tonya Clark remained at the apartment.

According to the victim, the three women were in the bathroom "fix[ing] their hair and put[ting] some make-up on" when the defendant returned to the apartment with a knife at his side. The defendant's son, Timothy Eady, arrived moments later, holding a "big club" and confronted the victim, asking why he called the defendant an "SOB." Meanwhile, Ms. Patterson, Ms. Clark, and Ms. Self attempted to push the Eadys out the door. When the victim ran from the apartment, he heard Timothy Eady yell, "Get him, boys." Johnny Atkins and his wife, Lisa Atkins, met the victim in the parking lot and began to curse and taunt him. The victim testified that Atkins charged at him, but he was able to "flip" Atkins to the ground in a "fireman's carry." He stated that he then attempted to escape, but was clubbed on the back of the head by Timothy Eady and stabbed in the neck by the defendant.

Dr. Ronald Coleman, an emergency room surgeon, testified that the victim suffered a laceration to his neck, "golf ball"-sized swelling, and "a fair amount of blood" loss. He stated that the stab wound could have injured major blood vessels in the victim's neck. Dr. Coleman conducted an operation on the victim's neck to close the wound and to remove a build-up of blood. The defendant's stitches remained in his neck for six weeks.

¹Timothy Eady was found not guilty by the jury.

Ms. Patterson testified that the defendant was obsessed with her. She recalled an incident in which she was leaving her apartment by car with her boyfriend, Joshua Crowe, and two other friends, when the defendant entered the car and placed a knife to the throat of one of the male occupants. Ms. Patterson testified that on another occasion, the defendant discovered a condom in her toilet and became angry because he believed that his nephew, Richard Jerger, had taken advantage of her while she was intoxicated. Ms. Patterson contended that the defendant unzipped his sleeping nephew's pants and threatened to cut off his "private part" in front of her and her two-year-old daughter. She recalled that on still another occasion, the defendant threatened her dinner date, Scott Griffith, with a knife. Ms. Patterson claimed that the defendant struck Griffith, chased him to his truck, and then jumped into the back of the vehicle, attempting to stab him with the knife. Ms. Patterson also testified that the defendant had attacked her ex-husband in a separate, unrelated incident.

Peggy Self testified that she saw the defendant argue with the victim and threaten him on the night of the assault. She recalled that shortly after the defendant was escorted away, he returned with what she described as a machete and swung it at the victim. Ms. Self testified that she then "jumped in the middle" of the two and that the defendant left soon before the officers arrived. After the officers departed, the defendant, armed with a knife, and Timothy Eady, who carried a "stick" about the size of a cane or baseball bat, returned to the apartment looking for the victim. Ms. Self stated that when the victim attempted to escape through the parking lot, Atkins tried to stop him but was "picked . . . up and slammed . . . to the ground." She testified that the victim continued to run away, but was stopped by the Eadys. She witnessed the defendant stab the victim in the neck.

Crystal Huskey, the victim's sister, also witnessed the argument between the victim and the defendant in Ms. Patterson's apartment. She testified that the defendant threatened the victim with a pocket knife before he was forced to leave. Ms. Huskey recalled that when the defendant returned, he was swinging a machete and "threaten[ing] everybody." She testified that she left Ms. Patterson's apartment before the defendant returned the third time and the final confrontation took place.

Joshua Crowe, who testified that he was in the "drunk tank" with the defendant on the morning of April 3, 1999, recalled that the defendant admitted that he "cut a blond-headed m---- f---- -'s throat." On cross-examination, Crowe acknowledged that he was arrested for public intoxication when the officers first arrived at Ms. Patterson's apartment complex.

Shane Neely, a jail informant, testified that sometime in April of 1999, the defendant admitted that he had "cut" the victim. At the defendant's request, Neely located the knife used in the attack and took it to the defendant's niece. On cross-examination, Neely acknowledged that he had been convicted of two counts of aggravated assault and robbery.

Tonya Clark, who was dating the defendant's son in April of 1999, testified for the defense. She maintained that the victim jerked the bedroom door open and called the defendant "names" when the defendant knocked. Ms. Clark testified that she saw the defendant "chug" whiskey from the bottle and was present when the defendant returned to Ms. Patterson's apartment with what she

described as a "sword." Ms. Clark contended that the defendant did not go near the victim and claimed that the defendant was persuaded to leave without any violence. Ms. Clark recalled that, afterwards, she and the others were about to leave when the defendant entered the apartment again. She described both the defendant and victim as "upset." Ms. Clark claimed that while she saw Timothy Eady enter the apartment armed with a stick, he did not threaten anyone. She testified that the victim was holding a liquor bottle and loudly invited either the defendant or his son to "bring it on." It was her recollection that Timothy Eady dropped the stick he was holding when the victim slammed Atkins to the ground. Ms. Clark stated that the victim ran around the building with the defendant and his son following closely behind. She stated that when she went around the building, the victim was knocking on a door and asking for someone to call an ambulance. On cross-examination, Ms. Clark acknowledged that in her statement to police she indicated that the defendant "had a hold" of the victim after the chase.

Lisa Atkins, the wife of Co-Defendant Atkins, testified that the first time she saw the victim he was arguing with the defendant in the parking lot. She stated that he was holding a liquor bottle in his hand and was making threats in a "hateful" tone. Ms. Atkins maintained that the victim was waving the liquor bottle, threatening to hit anyone that came close. She also recalled that Timothy Eady was holding a stick that looked like a tree limb.

Richard Jerger, the defendant's nephew, testified that the defendant had never threatened to cut off his "private parts" and that no one, including Ms. Patterson, had ever informed him that such an event occurred while he slept. He also denied that the defendant had used a knife to assault anyone in a car, acknowledging only that there was an argument which he helped settle. On cross-examination, Jerger acknowledged that he had pled guilty to charges of aggravated burglary, theft over \$1,000.00, three counts of automobile burglary, and five counts of theft under \$500.00.

Timothy Eady testified that on the night of April 2, 1999, he walked to Ocoee Village Apartments to see his fiancé. He contended that he always walked with a stick in order scare away stray dogs. He claimed that shortly after his arrival, he met the defendant, who informed him that the victim called him a "son-of-a-bitch." Timothy Eady testified that he and the defendant walked to Ms. Patterson's apartment and found the victim holding a half-gallon bottle of whiskey and smelling of alcohol. He claimed that he never raised his walking stick or threatened the victim in any way and that Ms. Clark and Ms. Patterson were attempting to persuade the victim, who denied having called the defendant an "SOB," to leave. He contended that the victim invited the confrontation and "just grabbed" Atkins, slamming him to the ground. He asserted that the victim ripped off his shirt and said, "If any of you all want some, come get it." While acknowledging that the defendant was chasing the victim, Timothy Eady explained that he merely chased after them out of concern for the defendant. He contended that the victim suddenly stopped running and turned to face the defendant at which point the two collided. He testified that he never saw the defendant in possession of a knife.

The defendant did not testify.

I

In this appeal, the defendant first contends that the trial court erred by allowing testimony of his prior bad acts. In particular, the defendant claims that the purpose of introducing evidence of alleged prior assaults with a knife was to show his propensity to use a knife to threaten Ms. Patterson's male companions.

Initially, the standard of review of the trial court's decision regarding the admissibility of the evidence was established in State v. DuBose, 953 S.W.2d 649 (Tenn. 1997). Where the trial court has complied with the procedural requirements of Tennessee Rule of Evidence 404(b), a decision will be upheld unless there has been an abuse of discretion; absent substantial compliance with the requisite procedure, the trial court "should be afforded no deference." Id. at 652. The applicable rule is as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:

- (1) The court upon request must hold a hearing outside the jury's presence;
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and
- (3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b).

Generally, this rule is one of exclusion but there are, as stated, exceptions. See State v. Parton, 694 S.W.2d 299 (Tenn. 1985); Bunch v. State, 605 S.W.2d 227 (Tenn. 1980); see also State v. Rickman, 876 S.W.2d 824 (Tenn. 1994). Most authorities suggest that trial courts take a "restrictive approach of 404(b) . . . because 'other act' evidence carries a significant potential for unfairly influencing a jury." Neil P. Cohen et al., Tennessee Law of Evidence § 4.04[8][e] (4th ed. 2000). That perhaps best explains the traditional posture of the courts that any testimony of prior bad acts by a defendant, when used as substantive evidence of guilt of the crime on trial, is not usually permissible. Parton, 694 S.W.2d at 302-03. The exceptions to the rule are when the evidence is offered to prove the motive, identity, or intent of the defendant, the absence of mistake, opportunity, or a common scheme or plan. Bunch, 605 S.W.2d at 229. Our supreme court has stated as follows:

[I]f evidence that the defendant has committed a crime separate and distinct from the one on trial is relevant to some matter actually in issue in the case on trial, and if its probative value as evidence is not outweighed by its prejudicial effect upon the defendant, then such evidence may be properly admitted.

State v. Howell, 868 S.W.2d 238, 254 (Tenn. 1993); see also State v. Zagorski, 701 S.W.2d 808 (Tenn. 1985); State v. Taylor, 669 S.W.2d 694 (Tenn. Crim. App. 1983).

The trial court ruled that the prior bad acts of the defendant were admissible as substantive evidence to establish motive or intent or possibly to show a scheme or plan to threaten men who became romantically involved with Ms. Patterson. During the hearing held out of the presence of the jury, Ms. Patterson testified that she was "hysterical" because the defendant regularly threatened her male companions. She testified that there had been six to 10 occasions where the defendant had "pulled a knife; hit, just took his fist and physically hit . . . [or] pulled out other weapons" on her male companions. The trial court also ruled that the probative value of the evidence clearly outweighed the danger of unfair prejudice.

Because the trial court substantially complied with the requirements of Rule 404(b), our standard of review of the trial court's determination is abuse of discretion. See DuBose, 953 S.W.2d at 652. That the defendant repeatedly threatened men that were in any way involved with Ms. Patterson was related to the issue of motive. Here, virtually every witness at trial testified that the victim and Ms. Patterson were having a private discussion in Ms. Patterson's bedroom when the defendant began beating and kicking at the door. According to witnesses, the defendant was angry because the victim and Ms. Patterson were alone in a bedroom. As soon as the victim opened the door, the defendant began threatening him and witnesses observed him carrying a knife. When the defendant returned to the apartment the second time, he carried a machete or a sword and threatened the victim once again. It was the state's theory that the defendant's attack on the victim was motivated by the initial bedroom encounter and that the defendant was obsessed with Ms. Patterson and jealous of any man that was involved with her in any way. In our view, the evidence was probative of the defendant's motive for the assault. The trial court did not abuse its discretion by the admission of the evidence.

II

Next, the defendant claims that the trial court committed error by failing to instruct the jury on the lesser included offense of attempted criminally negligent homicide. The trial judge, of course, has a duty to give a complete charge of the law applicable to the facts of the case. State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986). There is an obligation "to charge the jury as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so." Tenn. Code Ann. § 40-18-110(a). Pursuant to our statute and case law interpretations, defendants are entitled to jury instructions on all lesser offenses for which the evidence would support conviction. Complete instructions allow the jury to determine among each alternative the appropriate offense, if any, for conviction and to more evenly balance the rights of the defendant and

the state. It is only when the record is devoid of evidence to support an inference of guilt of the lesser offense that the trial court is relieved of the responsibility to charge the lesser crime. State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994); State v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990).

The guiding principle in determining whether to instruct on a particular lesser included offense is that if there is evidence in the record from which the jury could have concluded that the lesser included offense was committed, there must be an instruction for the offense. See Johnson v. State, 531 S.W.2d 558, 559 (Tenn. 1975). In State v. Burns, 6 S.W.3d 453 (Tenn. 1999), our supreme court adopted a two-step process in determining whether the evidence justifies a jury instruction on a lesser included offense:

First, the trial court must determine whether any evidence exists that reasonable minds could accept as to the lesser-included offense. In making this determination, the trial court must view the evidence liberally in the light most favorable to the existence of the lesser-included offense without making any judgments on the credibility of such evidence. Second, the trial court must determine if the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser-included offense.

Id. at 469.

In holding that the offense of attempted criminally negligent homicide did not exist, the trial court ruled as follows:

[T]he indictment alleges attempt. It doesn't allege either a second degree murder or a first degree murder. . . . [B]ut if you allege an attempt, then you get into specific intent . . . , and the law as I see it is pretty clear that you can't attempt to commit a negligent act. You may commit that as a lesser included if the act occurred, but an attempt implies a specific intent on the part of a defendant, and you can't attempt to commit a negligent act.

This court must agree. It has previously been held that the crime of attempted criminally negligent homicide does not exist under Tennessee law because one cannot intend to perform an unintentional act. State v. Christopher Todd Brown, No. M1999-00691-CCA-R3-CD (Tenn. Crim. App., at Nashville, March 9, 2000); State v. Guy William Rush, No. 03C01-9805-CR-00193 (Tenn. Crim. App., at Knoxville, Oct. 13, 1999), rev'd on other grounds; State v. Rush, ____ S.W.3d ____, No. E1998-00592-SC-R11-CD (Tenn. 2001); State v. Edward Lee Mooney, No. 02C01-9508-CC-00216 (Tenn. Crim. App., at Jackson, Dec. 30, 1998); State v. Dale Nolan, No. 01C01-9511-CC-00387 (Tenn. Crim. App., at Nashville, June 26, 1997), app. for perm. to appeal denied, (Tenn. March 2, 1998). Thus, the trial court did not err by failing to charge this alleged offense.

Accordingly, the judgment of the trial court is affirmed.

GARY R. WADE, PRESIDING JUDGE